UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRIAN WURTS,

Plaintiff,

v.

CITY OF LAKEWOOD, et al.,

Defendants.

CASE NO. C14-5113 BHS

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff Brian Wurts's ("Wurts") motion for summary judgment (Dkt. 29) and Defendants City of Lakewood, Brett Farrar, Choi Halladay, Heidi K. Hoffman, Andrew E. Neiditz, John Unfred's (collectively "Defendants") motion for summary judgment (Dkt. 30). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby grants in part and denies in part the motions for the reasons stated herein.

I. PROCEDURAL HISTORY

On February 5, 2014, Wurts filed a complaint against Defendants in Pierce County Superior Court for the State of Washington. Dkt. 2-10. Wurts asserts causes of action for wrongful discharge in violation of public policy, violations of Washington law against

discrimination ("WLAD"), deprivation of First Amendment rights, and deprivation of Equal Protection rights. *Id*.

On February 6, 2014, Defendants removed the matter to this Court. Dkt. 1.

On June 26, 2014, Defendants filed an amended answer and asserted counterclaims for unjust enrichment and fraud by omission. Dkt. 19.

On March 5, 2014, Wurts filed a motion for summary judgment (Dkt. 29) and Defendants filed a motion for summary judgment (Dkt. 30). Both parties responded (Dkts. 38 & 45), and both parties replied (Dkt. 49 & 50). On April 1, 2014, each party filed a surreply. Dkts. 54 & 55.

II. FACTUAL BACKGROUND

Defendant City of Lakewood ("City") hired Wurts in 2004 as an officer with the Lakewood Police Department. Dkt. 29-1, Declaration of Brian Wurts ("Wurts Decl."), ¶ 2. From 2004 to 2010, Wurts consistently received superior performance reviews for his work as an officer and on other projects. Dkt. 29-3, Declaration of Douglas McDermott ("McDermott Dec."), Exhs. 1–7. In addition to serving as a full-time senior patrol officer, Wurts served on the executive board of the Lakewood Police Independent Guild ("Guild"), the collective bargaining unit for commissioned officers and sergeants of the Lakewood Police Department, and as president of the Guild. Wurts Decl. ¶ 4.

In 2006, Wurts became president of the Guild. *Id*., ¶ 6. As Guild president, Mr. Wurts represented the rights and interests of the Guild and its members, which included engaging in negotiations with the City over the Collective Bargaining Agreement ("CBA") between the Guild and the City, representing Guild members with respect to

disciplinary actions, bringing multiple grievances on behalf of Guild members, and filing the Guild's first unfair labor practice complaint ("ULP") against the City in November 2011. *Id.* ¶ 7.

On February 8, 2012, Wurts's fellow officer, Skeeter Manos ("Manos"), was arrested and charged with ten counts of wire fraud in the United States District Court for the Western District of Washington. McDermott Dec., ¶ 9, Exh. 8. In the charging document, the Government alleged that Manos had embezzled over $112,000 in charitable donations intended for the families of Lakewood police officers killed in the line of duty, as well and an additional $47,000 from the funds he managed for the Guild as its treasurer. *Id.* Manos ultimately pled guilty to the charges against him. *Id.*

On February 8, 2012, the same day as Manos's arrest, Chief Brett Farrar placed Wurts on administrative leave. *Id.* ¶ 10, Ex. 9. The reason for this action was listed as "[a]llegations of such a serious nature that termination is the likely outcome if they are found to be true." *Id.* On that same day, the department initiated an investigation into Wurts's "[t]heft of donated funds" based on allegations from fellow officers. *Id.*, Exh. 10. Wurts was also instructed that, while on paid administrative leave, he was "to be available for duty or investigative purposes during" the period of leave. *Id.*

The initial investigation was subsequently amended to better describe the allegations against Mr. Wurts and clarify that they "involve[d] his duties as Guild President." *Id.*, Ex. 11. The amended notice contained the following "Summary of Complaint" against Wurts:

> It is alleged that Skeeter Manos stole at least $100,000 from donations intended for the children of our fallen Officers from December 2009 to February 2011 and that he spent this money on personal expenses. It is further alleged that Manos stole at least $30,000 from the Lakewood Police Independent Guild between 2006 and 2012. Since you were LPIG President during this time, it is alleged that you had knowledge of this activity and took no action.

Id., Ex. 12. The investigation was assigned the number 2012PSS-004. *Id.*

While investigation 2012PSS-004 was pending, four more investigations of Mr. Wurts were ordered. Investigation 2012PSS-005 involved allegations that Wurts received payment for his off-duty employment as a board member for a legal defense group, WACOPS, and lied to his department about being paid for the work performed. *Id*., Exh. 13. Investigation 2012PSS-013 involved allegations that Wurts took an out-of-state vacation while on paid administrative leave and continued to work for WACOPS in a paid capacity while on leave. *Id*., Exh. 14. Investigation 2012PSS-017 involved allegations that Wurts had engaged in sexual activity with another officer while on duty. *Id*., Exh. 15. Investigation 2012PSS-020 was described by Assistance Chief Michael Zaro as follows:

> The purpose of this investigation was to determine if Officer Wurts violated Department policy by talking to witnesses involved in investigation number 2012PSS-004 before it was finally adjudicated. Officer Wurts admitted in his statement that he talked to Officer Jeff Martin and former employee Shawn Noble about their statements prior to his Loudermill hearing. Officer Wurts acknowledges that this is contrary to department policy but believes it is his right to do so.

Id., Exh. 16.

On December 28, 2012, City Manager Andrew Neiditz and Assistant City Manager Choi Halladay sent Wurts a letter informing Wurts of his immediate

termination. *Id*., Exh. 17 ("Termination Letter"). The letter informed Wurts that the allegations that Wurts violated his oath of office, failed to obey all laws, and violated standards of professional conduct were found to be sustained and true. *Id*. at 1. Moreover, the letter stated that "the investigation supports the conclusion that [Wurts's] conduct facilitated the theft and fraud committed by Skeeter Manos." *Id*. at 2. With regard to a discipline determination, the letter provides as follows:

> Your performance evaluations are consistently satisfactory or superior and reflect the ability to carry out the day to day duties of an officer with the department.
>
> Given the disciplinary history and day to day performance, misconduct would have to be severe in order to merit significant discipline or termination. The recommendation of Chief Farrar is termination. I concur with this recommendation, because this misconduct reaches that level of severity.

Id. at 3.

With regard to the City's counterclaims, on December 31, 2012, Wurts made a claim to CIGNA Insurance Group ("CIGNA") for disability benefits. Wurts Decl., ¶ 33. CIGNA approved Wurts's claim and paid Wurts $414.70 per month for the months of May through December of 2012. *Id*. It is undisputed that Wurts was on paid administrative leave during these months.

III. DISCUSSION

A. Motions to Strike

Both parties filed a surreply, and both parties are aware that it is improper to include new argument or evidence in a reply brief. *See United States v. Puerta*, 982 F.2d 1297, 1300 n.1 (9th Cir. 1992).

First, Wurts improperly submitted a declaration and additional exhibits in support of his reply. Dkt. 51. Defendants correctly move to strike this additional evidence because it is improper. The Court agrees and grants Defendants' motion.

Second, Wurts argues that Defendants raised new arguments in their reply that were not raised in the initial motion. Dkt. 54. Specifically, Wurts argues that "[f]or the first time in their reply brief, defendants ask the Court to dismiss plaintiff's claims in their entirety against defendants Halladay, Unfred, and Hoffman." Dkt. 54 at 2. Notwithstanding the fact that individual liability against these defendants appears to be completely implausible, Wurts is correct that Defendants did not raise these issues in their original brief. Because asserting such claims may needlessly increase the cost of litigation and unnecessarily consume resources of the parties and the Court, Wurts may file a subsequent brief on the merits of these claim alone no later than May 7, 2015. Therefore, the Court denies Wurts's motion to strike as moot.

B. Summary Judgment

In this case, Wurts moves for summary judgment on his claim for wrongful termination in violation of public policy based on his union activities and on the City's counterclaims. Dkt. 29. Defendants move for summary judgment on all of Wurts's claims. Dkt. 30.

1. Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,

nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

2. Discrimination

In this case, Defendants argue that Wurts failed to meet the procedural requirements for asserting a discrimination claim based on his sexual orientation. Dkt. 30 at 13–15. In the alternative, Defendants argue that Wurts's claim fails as a matter of law. *Id*. at 15–18.

a. Procedural Requirements

In this case, Wurts served a claim for damages on the City on October 9, 2013. Bolasina Decl., Ex. E. The claim, in relevant part, provides as follows:

> On December 28, 2012, [Wurts's] employment with the Lakewood Police Department was terminated for his protected conduct and actions as union president.
>
> ***
>
> Mr. Wurts was subject to discrimination in violation of the Washington Law Against Discrimination, RCW 49.60.180, and suffered an adverse employment action and termination as a result of discrimination.
>
> Mr. Wurts was an employee protected by a collective bargaining agreement and his employment was terminated in contravention of the public policy evinced by RCW 41.56. He was discharged in violation of a clear mandate of public policy based upon his engagement in protected union activities.

Id. at 5. Defendants argue that "[n]othing in [Wurts's] claim would have put the City on notice of his claim for sexual orientation." Dkt. 30 at 15. Wurts, however, argues that Defendants waived this argument and that Wurts substantially complied with the statute. Dkt. 45 at 14.

With regard to waiver, "a defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense." *King v. Snohomish Cnty.*, 146 Wn.2d 420, 424 (2002) (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 39 (2000)). Under this law, Wurts asserts that Defendants' conduct is inconsistent with the assertion of the defense. Specifically, Wurts argues that, "[b]y engaging in prolonged and costly discovery and litigation on the merits of plaintiff's claims, and unrelated to the claim filing affirmative defense, defendants have waived the defense." Dkt. 45 at 15. It is undisputed that there are no other unusual substantive or procedural facts in this case. Wurts simply argues that Defendants should have brought a pre-discovery dispositive motion on this issue and, because they didn't, they waived this defense. There is no case that stands for that proposition. Defendants asserted the affirmative defense in their answer and raised the defense in their first dispositive motion. Concluding that Defendants waived the defense under these usual and normal procedural facts would prescribe a new rule of law that the defense must be raised in a dispositive motion before the summary judgment stage or else it is waived. The Court declines to adopt Wurts's proposition as a rule of law. Therefore, the Court concludes that Defendants did not waive this defense.

With regard to the second procedural argument, the claim filing statute "must be liberally construed so that substantial compliance will be deemed satisfactory." RCW 4.96.020(5). One of the purposes of the statute is to allow governmental entities time to investigate, evaluate, and settle claims. *Medina v. Public Util. Dist. No. 1*, 147 Wn.2d

303, 310 (2002). To effectuate this purpose, the Notice of Claim must describe "the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed." RCW 4.96.020(3). Although courts require strict compliance with the filing deadlines of RCW 4.96.020, the content of the Notice of Claim need only substantially comply. *Sievers v. City of Mountlake Terrace*, 97 Wn. App. 181, 183 (1999).

In this case, Defendants argue that Wurts did not substantially comply with the claim filing statute. Dkt. 50 at 4–5. The Court agrees. First, Wurts's claim only explicitly refers to discrimination based on his union activities. The claim makes no mention whatsoever of any other type of discrimination. Wurts's failure to at least alert Defendants that any other type of discrimination allegedly occurred shows that he did not comply with the purpose of the statute by allowing the governmental entity an opportunity to investigate or evaluate the claim.

Second, even if one considered citing the relevant discrimination statute notice of a sexual discrimination claim, Wurts failed to provide anything more than mere labels and conclusions. Wurts did not mention the type of injury, when the injury occurred, or the names of the persons involved. Wurts doesn't contest any of these failures and only argues that the notice requirement should be liberally construed and is not intended to be a "gotcha" provision. Dkt. 45 at 15–16. The Court agrees that it is not intended to be a "gotcha" provision for either party, but places the burden on the claimant to effectuate the purpose of the statute. As such, the Court concludes that Wurts failed to substantially comply with the notice provision of the statue by only citing the WLAD. Therefore, the

Court grants Defendants' motion on Wurts's sexual orientation discrimination claim for failure to meet the procedural prerequisites.

b. Merits

Even if Wurts met the procedural requirements for this claim, he has failed to establish his prima facie case and submit evidence of pretext. Under *McDonnell Douglas*, unlawful discrimination is presumed if the plaintiff can show that (1) he belongs to a protected class, (2) he was performing according to his employer's legitimate expectations, (3) he suffered an adverse employment action, and (4) other employees with qualifications similar to his own were treated more favorably. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973))[1]. If the plaintiff succeeds in doing so, then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory conduct. *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003), *as amended* (Jan. 2, 2004). If the defendant provides such a reason, the burden shifts back to the plaintiff to show that the employer's reason is a pretext for discrimination. *Id.*

First, Wurts has failed to establish his prima facie case of discrimination. Not only does Wurts fail to cite any evidence in support of his claim (*see* Dkt. 45 at 17–18), but Wurts also fails to show that other employees were treated more favorably. Defendants initiated their initial investigation based on allegations that Wurts was either involved in

[1] The *McDonnell Douglas* test is used for Wurts's WLAD and Equal Protection claims.

or at least complacent in Manos's embezzlement. While Wurts argues that no other member of the Guild's board was subject to an investigation, Wurts fails to submit any evidence that any other member of the board was alleged to have participated or at least acted to conceal Manos's crimes. Moreover, Wurts fails to acknowledge the investigations that resulted in findings that Wurts had violated the department's Manual of Standards or identify any other officer that committed similar infractions and was not terminated. Therefore, the Court finds that Wurts has failed to establish a prima facie case of discrimination.

Second, Wurts fails to submit any evidence that Defendants' legitimate, nondiscriminatory reasons for terminating Wurts, as set forth in the Termination Letter, are merely pretext for discrimination. Instead, Wurts argues in a conclusory fashion that Defendants' reasons are "unworthy of belief." Dkt. 45 at 18. Wurts must do more than provide attorney argument. Moreover, Wurts repeatedly asserts that others should have also been investigated for Manos's actions and for improper sexual activity while on the job. Yet, Wurts fails to submit any evidence to substantiate such claims. In fact, this is the reason no other officer was investigated, a lack of evidence to initiate an investigation. Whether circumstantial or direct, Wurts fails to submit any evidence in support of pretext. Therefore, the Court grants Defendants' motion on Wurts's discrimination claim based on sexual orientation.

3. Discharge in Violation of Public Policy

Washington law recognizes a cause of action for wrongful discharge where the discharge violates a clear mandate of public policy. *See Reninger v. State Dep't of*

Corrs., 134 Wn.2d 437, 446 (1998). To establish such a claim, a plaintiff must show (1) a clear public policy, (2) that discouraging the plaintiff's conduct would jeopardize the public policy (the "jeopardy element,") and (3) that the plaintiff's public-policy-linked conduct caused the dismissal. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 178-79 (2005); *Briggs v. Nova Servs.*, 166 Wn.2d 794, 817 (2009); *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941 (1996). Then, "'the defendant must not be able to offer an overriding justification for the dismissal' (absence of justification element)." *Hubbard*, 146 Wn.2d at 707 (quoting *Gardner*, 128 Wn.2d at 941).

a. Sexual Orientation

The issue on this claim is whether the WLAD provides an adequate alternative legal remedy. "In order to establish the jeopardy element, a plaintiff must show that other means of promoting the public policy are inadequate . . . ." *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530 (2011) (citing *Hubbard v. Spokane County*, 146 Wn.2d 699, 713 (2002)). The Washington Supreme Court

> has repeatedly applied this strict adequacy standard, holding that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means and thereby maintaining only a narrow exception to the underlying doctrine of at-will employment.

Cudney, 146 Wn.2d at 530. Moreover, the "court has always been mindful that the wrongful discharge tort is narrow and should be 'applied cautiously.'" *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208 (2008) (quoting *Sedlacek v. Hillis*, 145 Wn.2d 379, 390 (2001)).

In this case, Wurts has failed to show that the WLAD inadequately promotes the public policy of discrimination based on sexual orientation. Other than attorney argument and selectively misquoted cases, Wurts fails to offer any argument that this duplicative claim should proceed. First, Wurts cites *Piel v. City of Fed. Way*, 177 Wn.2d 604 (2013), for the proposition that a "wrongful discharge claim exists to promote and protect that underlying purpose [to eradicate discrimination] and therefore may proceed alongside a claim under the [WLAD] statutory scheme." Dkt. 45 at 21. In *Piel*, however, the court reaffirmed prior cases holding that

> an employee protected by a collective bargaining agreement may bring a common law claim for wrongful termination based on the public policy provisions of chapter 41.56 RCW notwithstanding the administrative remedies available through [the Public Employees Relations Commission].

Piel, 177 Wn.2d at 607. In other words, the court has repeatedly held that the PERC administrative remedies inadequately promote the public policy in question. As such, *Piel* does not support the proposition that the WLAD inadequately promotes the public policy against discrimination. In fact, the only discrimination cases in which the court found that the WLAD does not promote this policy involved employers that fell below the statutory minimum number of employees. *See, e.g.*, *Roberts v. Dudley*, 140 Wn.2d 58 (2000), *as amended* (Feb. 22, 2000). Because Wurts does not contend that WLAD does not apply to Defendants, Wurts's argument is without merit.

Second, Wurts contends that a wrongful termination claim is precluded only when the statutory remedy is "mandatory and exclusive." Dkt. 45 at 22 (citing *Cudney*, 146 Wn.2d at 535). In citing this test, Wurts incorrectly cites pre-*Gardner* case law. *See id.*

(citing *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46 (1991)). Since *Gardner*, however, the Washington Supreme Court has "consistently said that a plaintiff must show that other means of promoting the public policy are inadequate." *Cudney*, 172 Wn. 2d at 535. Therefore, both of Wurts's arguments are without merit, and the Court grants Defendants' motion on Wurts's claim for wrongful termination in violation of public policy based on his sexual orientation.

b. Union Activity

Wurts also asserts a claim that he was wrongfully discharged for his union activity. On this claim, the parties dispute the causation element and the absence of justification element. With regard to causation, this element is generally a question of fact. *See Sedlacek v. Hillis*, 104 Wn. App. 1, 23 (2000), *aff'd in part, rev'd in part*, 145 Wn.2d 379 (2001). Wurts argues that he was fired merely because "he was president of the Guild." Dkt. 49 at 6. In fact, Wurts asserts that the "reasons stated in the [Termination Letter] unambiguously establish that [he] was terminated for his conduct as [Guild] president." Dkt. 29 at 20. While Wurts's termination letter does reference his conduct as president that "facilitated the theft and fraud committed by Skeeter Manos," the letter also references Wurts's violations of his oath of office, his duty to obey all laws, and his duty to abide by certain standards of personal conduct. *See* Termination Letter at 1–3. Based on these facts, Defendants have shown that material questions of fact exist on the issue of whether Wurts was wrongfully terminated in violation of public policy. Therefore, the Court denies Wurts's motion for summary judgment on this claim.

Likewise, Wurts has shown that questions of fact exist on the issue of a nexus between his conduct as president and his wrongful discharge. While there is evidence that Wurts's friendship with Manos could have clouded his judgment, this is not the only conclusion that a reasonable juror could make. For example, a reasonable juror could conclude that the City was motivated by the opportunity to terminate a union president who openly criticized the City's management. Therefore, the Court denies Defendants' motion on this issue.

With regard to an absence of justification, Defendants have failed to show that there is an absence of material questions of fact. The Termination Letter provides in part as follows:

> Your performance evaluations are consistently satisfactory or superior and reflect the ability to carry out the day to day duties of an officer with the department.
>
> Given the disciplinary history and day to day performance, misconduct would have to be severe in order to merit significant discipline or termination.

Termination Letter at 3. Based on this admission by the City, the Court is unable to conclude that every reasonable juror could conclude that Wurts's conduct merited termination. Therefore, the Court denies Defendants' motion on Wurts's claim for termination in violation of public policy based on his union activities.

4. First Amendment

To establish a prima facie case for violation of the First Amendment, a plaintiff bears the burden to show that: (1) he spoke on a matter of public concern; (2) he spoke as a private citizen rather than as public employee; and (3) his protected speech was a

substantial or motivating factor in the adverse employment action taken against him. *Desrochers v. City of San Bernardino*, 572 F.3d 703, 708–09 (9th Cir. 2009).

In this case, the parties dispute whether Wurts's speech was a matter of public concern. To warrant First Amendment protection, an employee's speech must address "a matter of legitimate public concern." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 571 (1968). As a matter of law, "the competency of the police force is surely a matter of great public concern." *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983). Only speech that deals with "individual personnel disputes and grievances" and that would be of "no relevance to the public's evaluation of the performance of governmental agencies" is generally not of "public concern." *Id*.

Although Defendants argue otherwise, Wurts's speech as Guild President went beyond individual personnel disputes and grievances. At the very least, Wurts lobbied on behalf of the entire police force for across-the-board raises and identified allegedly overpaid City administrators. Dkt. 46, Exh. 1. Wurts also addressed issues with a reduced police force and the impacts on crime in the community. *Id*., Exh. 2. While it is true that, as an officer, Wurts would have received a benefit from the requested raise, the Court is unable to conclude that Wurts's speech was of no relevance to the public's evaluation of the City's operations. *McKinley*, 705 F.2d at 1114. Therefore, the Court denies Defendants' motion on Wurts's First Amendment claim.

5. Failure to Promote

Defendants move for summary judgment on Wurts's claim that he was improperly passed over for promotion. Dkt. 30 at 21–22. While Wurts agrees that such claims are

precluded by the statute of limitations, Wurts argues that evidence of the failure to promote may still be admitted to prove his other claims. Dkt. 45 at 24–25. The Court will address issues regarding admissible evidence either in the parties' motions in limine or when the evidence is offered at trial. For purposes of the current motion, it is enough to conclude that Defendants are entitled to summary judgment on any claim for failure to promote. Therefore, the Court grants Defendants' motion on this claim.

6. Duty to Mitigate

The duty to mitigate damages requires a plaintiff to exercise reasonable diligence in finding other suitable employment. *See Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980). Failure to mitigate damages can prevent the award of both back pay and front pay. *Goodman v. Boeing*, 75 Wn. App. 60, 79 (1994). The question of whether an employee used sufficient diligence in seeking comparable employment is usually a question of fact, but, where the facts are undisputed and permit only one conclusion, it may be decided as an issue of law. *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1021 (9th Cir. 2000); *E.E.O.C. v. High Speed Enter., Inc.*, 833 F. Supp. 2d 1153, 1162 (D. Ariz. 2011).

"The back pay remedy is explicitly limited by a duty to mitigate and is reducible by the plaintiff's interim earnings, or by the amount the plaintiff would have earned with 'reasonable diligence.'" *McCoy v. Oscar Mayer Foods*, 108 F.3d 1379 (7th Cir. 1997) (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982)). "Front pay awards, like backpay awards, are also reduced by the amount the plaintiff could earn using reasonable mitigation efforts." *Barron v. Safeway Stores, Inc.*, 704 F. Supp. 1555, 1570 (E.D. Wash.

1988). Where a plaintiff incurs certain losses "because of a clearly unjustifiable refusal to take desirable new employment, the amount of these losses will be deducted from the backpay award." *N.L.R.B. v. Int'l Bhd. of Elec. Workers, Local Union 112, AFL-CIO*, 992 F.2d 990, 993 (9th Cir. 1993). However, "an employer is 'released from a duty to establish the availability of comparable employment' if the employer can prove 'that the employee made no reasonable efforts to seek such employment.'" *Haeuser v. Dep't of Law*, 368 F.3d 1091, 1100 (9th Cir. 2004) (internal citations omitted).

In this case, Defendants argue that Wurts completely failed to mitigate his damages, which bars his claims for back or front pay. Dkt. 30 at 22–24. Wurts argues that questions of fact exist and that, even if he failed to mitigate, such failure only reduces those damages that "could have been avoided through reasonable efforts under the circumstances." Dkt. 45 at 26. Wurts is wrong on both issues. First, Wurts has failed to show that questions of fact exist as to his reasonable efforts to seek employment because he did not seek any employment. He asserts that he is "not currently employable as a police officer or eligible for substantially similar employment due to his termination." Dkt. 45 at 27. The Court agrees with Wurts that questions of fact exist for trial if he can show that he "would have been unable to obtain comparable employment because he had been fired from his government job." Dkt. 45 at 27 (citing *Haeuser v. Dep't of Law*, 368 F.3d 1091, 1101–1102 (9th Cir. 2004)). In *Haeuser*, however, the plaintiff submitted actual evidence that at least two large law firms in the area would not hire an attorney that had been fired from a prior job, which had happened to plaintiff. *Haeuser*, 368 F.3d at 1102. Contrary to the plaintiff in *Haeuser*, Wurts has failed to submit any evidence to

support his assertion that he is unemployable, and it is undisputed that he never applied for a job and that he was never rejected. Under these circumstances, conclusory allegations are insufficient to overcome a summary judgment motion.

Furthermore, Wurts's assertion that he spent a couple hours a week on self-employment ventures is insufficient to meet his burden on this issue. *See, e.g.*, *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir. 1989) ("Hansard's efforts were simply insufficient. The flea market business was never more than a part-time enterprise. Hansard was fully capable of continuing his job search during the week."). Therefore, the Court finds that Wurts has failed to submit sufficient evidence to show that material questions of fact exist for trial on this issue.

Second, lost and future wages are distinct categories of damages that may be reduced in certain circumstances. While Wurts may have claims for other types of damages (emotional distress, nominal damages, etc.), his failure to mitigate lost wages is dispositive of seeking damages for any amount of lost wages. In other words, because Wurts did not apply for any other job, no reasonable juror could award Wurts any amount of lost wages and, therefore, there is no amount of wages to reduce. The Court grants Defendants' motion on Wurts's claim for lost wages.

7. Unjust Enrichment

"Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young*, 164 Wn.2d 477, 484 (2008). Under Washington law, however, "[a] party to a valid express contract is bound by the provisions of that contract, and may not

disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." *Chandler v. Wash. Toll Bridge Auth.*, 17 Wn.2d 591, 604 (1943).

In this case, Wurts moves for summary judgment on the City's claim for unjust enrichment. It is undisputed that the parties entered into a valid contract of employment, and the City even asserts that one of the conditions of being on paid administrative leave is that the employee is capable of doing the essential functions of the job. Dkt. 38 at 9. What remains unclear, however, is whether the conditions of leave are part of the parties' contract or the CBA. Because the validity of this claim turns on whether a valid contract exists, the Court requests that the parties address this issue at the pretrial conference on May 4, 2015. Therefore, the Court reserves ruling on this claim.

8. Fraud

In the alternative to unjust enrichment, the City asserts a claim against Wurts for fraud by omission and argues that Wurts had an affirmative duty to disclose material facts to his employer, the City. A party can "establish fraudulent concealment or misrepresentation . . . [by] simply show[ing] that the defendant breached an affirmative duty to disclose a material fact." *Crisman v. Crisman*, 85 Wn. App. 15, 22 (1997), *as amended on denial of reconsideration* (Feb. 14, 1997) (citing *Oates v. Taylor*, 31 Wn.2d 898, 902–03 (1948)). Absent an affirmative duty to disclose material facts, a defendant's silence does not constitute fraudulent concealment or misrepresentation. *Favors v. Matzke*, 53 Wn. App. 789, 796, *review denied*, 113 Wn.2d 1033 (1989). When a duty to disclose does exist, however, the suppression of a material fact is tantamount to an

affirmative misrepresentation. *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 526 (1994); *Oates*, 31 Wn.2d at 902.

In this case, the parties dispute whether Wurts had an affirmative duty to disclose that he was disabled and unable to perform his job while on administrative leave. The City again fails to cite any authority for its position. Aside from standard principal-agency law and cases involving the sale of real property, the City provides only one arguably analogous case where the employee ran a side business with the employer's resources. *See* Dkt. 38 at 20–22. In *Williams v. Queen Fisheries, Inc.*, 2 Wn. App. 691, 694 (1970), the employer asserted a counterclaim against one of its corporate officers because the officer used the employer's resources to run a personal business. The court held that a corporate officer occupied a "fiduciary relationship to a private corporation and shareholders thereof akin to that of a trustee, and owe undivided loyalty and a standard of behavior above that of the workaday world." *Id*. The Court finds that *Williams* is factually distinguishable because Wurts was merely an employee and, if anything, only owed a duty akin to the regular workaday world. Therefore, the Court concludes that Wurts did not owe a duty to the City to affirmatively disclose an inability to perform his job and grants Wurts's motion on the City's claim for fraud by omission.

IV. ORDER

Therefore, it is hereby **ORDERED** that (1) Wurts's motion for summary judgment (Dkt. 29) is **GRANTED in part** on the City's counterclaims for unjust enrichment and fraud and **DENIED in part**; and (2) Defendants' motion for summary judgment (Dkt. 30) is **GRANTED in part** on Wurts's claims for wrongful discharge in violation of

public policy based on sexual orientation, discrimination in violation of the WLAD, deprivation of Equal Protection rights, and request for lost wages, and **DENIED in part**.

Dated this 29th day of April, 2015.

BENJAMIN H. SETTLE
United States District Judge